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UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION II
26 Federal Plaza
New York, New York 10278

In the Matter of	
Duane Marine Corporation Perth Amboy, New Jersey	Docket No. OH-II-79-66
Violation of the Oil Pollution Prevention Regulations issued pursuant to §311(j)(1)(C) of the Clean Water Act, 33 U.S.C. §1321	DECISION OF PRESIDING OFFICER

INTRODUCTION AND BACKGROUND

This proceeding was instituted by a Notice of Violation and Assessment of Civil Penalty, dated December 18, 1979, which was received by Mr. Ed Lecarreaux, President of Respondent, Duane Marine Corporation, on December 20, 1979.

The Notice charged Respondent with failure to prepare a Spill Prevention Control and Countermeasure (SPCC) Plan and failure to implement such a Plan by January 10, 1975 as required by 40 CFR 112.3. A penalty of $10,000 was proposed.

Settlement negotiations were unsuccessful and a hearing was scheduled for July 20, 1981 at 10 A.M. at 26 Federal Plaza in New York. Without any explanation either before or after the scheduled hearing Respondent failed to appear.

Part 114 of 40 CFR dealing with civil penalties for violations of oil pollution prevention regulations makes no provision for default proceedings.

EPA's consolidated rules of practice governing the administrative assessment of civil penalties (40 CFR Part 22) do provide for default orders "sua sponte upon failure to appear at a.... hearing without good cause being shown... [provided that] the complainant presents sufficient evidence to the Presiding Officer to establish a prima facie case against the respondent" (40 CFR 22.17). Although SPCC penalty proceedings are not included in these consolidated rules, I elected to apply them to this case in the absence of any other applicable regulations.

The Government presented its case against Respondent from which the following appears:

Respondent is an oil spill cleanup contractor with an office and facilities for the storage of waste oils formerly located at 26 Washington Street, Perth Amboy, New Jersey adjacent to the Arthur Kill, a navigable waterway of the United States.

On May 14, 1979, an EPA inspector visited Respondent's premises and was given a copy of Respondent's SPCC Plan, certified by a professional engineer under date of May 9, 1978. Respondent had begun storing waste oil at the Perth Amboy premises sometime during the period from November to December, 1977. On May 17, 1979 the inspector wrote to Respondent asking for additional information which was supplied on June 5, 1979. On March 12, 1980 the inspector sent to Respondent a copy of his report, dated May 22, 1979, on the latter's SPCC Plan. The report listed the following deficiencies:

1. Failure to implement the Plan by increasing the curbing around the equipment washdown area and the waste oil transfer area to a

height of six inches in order to prevent excess oily water from flowing into the Arthur Kill.

2. Inadequate secondary containment in the tank truck unloading area.

3. No suitable secondary containment for possible spillage or leakage from approximately 3000 drums stored on the premises and containing waste oils or other waste materials.

4. No inspection records.

5. No provision for removal of rainwater and facility runoff from an in-ground scale trench.

6. No adequate control of possible drum leakage and truck spillage.

The inspector's letter of March 12, 1980 to Respondent suggested either a meeting to discuss the deficiencies or the submission of a revised SPCC Plan by May 1, 1980. A meeting was held on March 28, 1980 when the EPA inspector again visited the premises. This was followed by a letter, dated April 10, 1980, from EPA's Enforcement Division requesting the submission of an amended SPCC Plan by May 1, 1980 addressing not only the 6 items listed above but also the following:

1. A trailer storage area not previously noted.

2. The presence of underground gasoline storage tanks not disclosed by the original Plan.

3. Continued inadequacy of record keeping.

On June 4, 1980 Respondent wrote to EPA's Enforcement Division outlining an oil spill contingency plan covering the temporary storage of approximately 3000 drums until a permanent storage area could be developed and included in a revised SPCC Plan "which will be submitted by July 1,

1980". According to the letter this contingency plan had been discussed with EPA's inspector during another visit by the latter on May 23, 1980 who, according to the letter, stated at that time that it would be satisfactory to EPA. This statement was not contradicted by the inspector.

On July 16, 1980 Respondent's consulting engineer submitted to EPA's inspector a draft revision of an SPCC Plan which with minor corrections suggested by the inspector and accepted by the engineer "should fully satisfy 40 CFR 112" according to an August 6, 1980 memorandum from the inspector to the Enforcement Division.

Before a final Plan could be prepared and submitted to EPA, Respondent's operating facilities at the premises were destroyed by fire sometime in July. The facilities have not been rebuilt and apparently it is not contemplated that they will be.

DISCUSSION

EPA's regulations provide that no penalty shall be assessed until the owner or operator shall have been given notice specifying the nature of the violation (§§114.1 and 114.4) and that in determining the amount of the penalty one factor to be considered shall be good faith efforts to achieve compliance after notification of a violation. (§114.3(a)(2)). The notice is to "be sent to the person charged with a violation" (§114.4) which obviously means that it must be in writing. EPA maintains that, at least for the purpose of determining good faith compliance, oral notice of at least some of the alleged deficiencies given to Respondent during the May, 1979 visits to the site by EPA's inspector was sufficient. (Transcript,

page 12.) I cannot accept this argument either for the purpose of determining liability or good faith efforts to achieve compliance because it is completely inconsistent with EPA's regulations.

Neither does the written Notice of Violation, served on Respondent on December 20, 1979 supply the information required by §114.4(b). That section calls for a specification of the nature of the violation. That means a listing of details sufficient to inform Respondent of the particular deficiencies with which he is to be charged. Blanket allegations, such as those in the Notice of Violation, that Respondent has failed (1) to prepare a SPCC Plan as required by §112.3 and (2) to implement it by January 10, 1975 as required by §112.3 do not detail the required particulars.

The first allegation is so imprecise that standing alone it could mean either that the Respondent is to be charged with having prepared no SPCC Plan at all or with having prepared an inadequate one. If the former had been intended, no further particularization would have been required. But from the background recited above, the intended charge was obviously one of having prepared an inadequate SPCC Plan, -a charge that is itself inadequate without a written specification of the alleged deficiencies.

The second allegation not only suffers from the same infirmity but also is inaccurate in its factual statement that the implementation of the Plan was required by January 10, 1975. That date was applicable to owners or operators of facilities in operation on or before the effective date of 40 CFR Part 112, which was January 10, 1974. Respondent did not begin storing waste oils at the premises until sometime during the November-December 1977 period, -a fact known to EPA when the Notice of Violation

was issued (EPA Exhibit 7). Such an owner or operator was required to prepare an SPCC Plan within six months after the date the facility began operations (§112.3(b)). The specification of a November-December 1977 start-up period supplies no particular date. But even if a November 1 date is assumed, Respondent's May 9, 1978 SPCC Plan missed the six-months' deadline by only 9 days, which I would consider an insignificant violation.

In addition, §112.3(b) required that the Plan be fully implemented not later than one year after the facility began operations. If for this purpose a December 31, 1977 start-up date is assumed, the implementation deadline would have been December 31, 1978.

But no written notice containing the required listing of alleged deficiencies in Respondent's 1978 SPCC Plan or its implementation was given to Respondent until the inspector's letter of March 12, 1980, ten months after the initial inspection of Respondent's premises, followed by a listing of additional deficiencies in the Enforcement Division's letter of April 10, 1980.

Although both letters called for the submission of a corrected and updated SPCC Plan by May 1, 1980, I find that such a time period was unreasonably short. I also find that Respondent's submission on June 4, 1980 of an interim oil spill contingency plan, discussed with and apparently approved by the EPA inspector during a meeting between him and Respondent's President on May 23, 1980, followed by the submission on July 16, 1980 by Respondent's consulting engineer of a draft of a revised SPCC plan acceptable, with minor corrections, to the inspector, demonstrated good faith efforts by Respondent to achieve rapid compliance after notification of the alleged violations within the meaning of §114.3(a)(2).

Counsel for EPA attacks these efforts as too late. He characterizes a statement in the inspector's report of deficiencies, dated May 22, 1979, as imposing promises and commitments on Respondent to arrange meetings with EPA to discuss means for remedying the deficiencies. (Transcript, pages 11, lines 24-25; page 12, line 2; page 13, lines 22-25). The statement in question says that "[i]t was agreed that I would advise Mr. Lecarreaux of my recommendations and meet with him and his professional engineer to institute immediate corrections to, and implementations of, his SPCC plan" (EPA Exhibit 4, page 3). As noted above, written advice of the inspector's recommendations was not forwarded to Respondent until almost ten months later and in the meantime the quoted language implied no promise or commitment on Respondent's part to do anything. Even if the inspector's comments had been sent to Respondent when they were written, Mr. Lecarreaux would have been completely justified in assuming that the next move was up to the inspector.

Apart from the element of good faith, if Respondent was guilty of violating EPA regulations because it did not correct the deficiencies noted in EPA's letters of March 12, 1980 and April 10, 1980 between the time of their receipt and the fire which destroyed its facility in July, 1980, I am also required to consider the gravity of those violations.

On this point "[t]he environmental consequences, or possible environmental consequences, of a violation of the regulations are always relevant to determination of the gravity of a violation...." In re Brewer Chemical Corporation (Decision of the Administrator, May 19, 1976).

Here, the actual environmental consequences of Respondent's failure to correct the deficiencies after receiving notice thereof and before the destruction of its facility by fire were, as a practical matter, nil. Although EPA's inspector noted an oil sheen flowing toward the Arthur Kill in his May 22, 1979 report, there is no evidence of any significant oil discharge from the premises at any time. And the threat of possible environmental consequences was minimal. EPA's inspector considered the approximately 3000 barrels, containing waste oils and other waste residues, stored on the premises as constituting the most serious threat to the environment because of the possibility of leakage or spillage which, if not contained, would flow into the Arthur Kill. But the prospect of leaks or spills from more than a few drums at any one time was remote and, even if such an unlikely occurrence should take place, Respondent as an oil spill cleanup contractor had specialized equipment and trained personnel at hand to deal with such an emergency (EPA Exhibit 14). The same is true with respect to the other physical deficiencies referred to in EPA's letters of March 12, 1980 and April 10, 1980. Furthermore, the July 1980 fire has removed the possibility of future discharges.

CONCLUSION

I am troubled by provisions in EPA's Consolidated Rules on civil penalties which I have elected to follow even though they do not specifically apply to SPCC proceedings and which appear to me to be confusing and contradictory. 40 CFR 22.17(a) says that in the case of a civil penalty, "the penalty proposed in the complaint shall become due and payable by

respondent without further proceedings sixty (60) days after a final order issued upon default". This seems to say that the Presiding Officer has no discretion in the matter when the Respondent is in default. But 40 CFR 22.17(c) provides that a "default order shall include...the penalty which is recommended to be assessed...." which indicates that the amount is within the discretion of the Presiding Officer. I find this latter interpretation more acceptable than the former and I, accordingly, adopt it.

At the default hearing the Enforcement Division urged the imposition of the same $10,000 penalty proposed in the complaint. However, under all of the circumstances, including EPA's initial failure to comply with its own regulations with respect to written notice of deficiencies and its substantial delay in ultimately giving such notice, I conclude that the imposition of a civil penalty against Respondent in any amount is inappropriate.

CONCLUSION

For the foregoing reasons Complainant's Notice of Violation is dismissed.

Dated: September 3, 1981

Paul E. Bermingham
Presiding Officer

Date

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REMARKS

Duane Marine

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